Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

DOUGLAS ALAN JARVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

BENJAMIN S. WAXMAN, Esquire
Counsel of Record
ALAN S. ROSS, Esquire
ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A.
2250 Southwest Third Avenue
Fourth Floor
Miami, Florida 33129
(305) 858-9550

Counsel for Petitioner Douglas Alan Jarvis

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

36 pp

QUESTIONS PRESENTED

I. Whether a defendant's due process rights are violated by the district court's denial of an evidentiary hearing upon his claim that the government failed to provide him substantial exculpatory documentary evidence based on the government's bare assertion that the documents were produced?

II. Whether a judicial determination that a defendant did not receive use immunity precludes an otherwise well-supported public authority defense?

III. Whether a court can reject a claim of ineffective assistance of counsel based on trial counsel's failure to argue a public authority defense and to request a corresponding jury instruction by finding an absence of prejudice based on the jury's failure to acquit after hearing the defendant's supporting testimony unguided by a jury instruction?

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals, Fourth Circuit, denying a certificate of appealability and dismissing is reproduced in the Appendix (hereinafter "A") at page 1-2. The underlying rulings of the district court, denying Petitioner's section 2255 motion to vacate and motion to reconsider, are reproduced at A-3-12, and A-13-14, respectively. The Fourth Circuit's decision denying rehearing and rehearing *en banc* is reproduced at A-15.

JURISDICTION

The judgment to be reviewed was entered on August 26, 1998. A-1. Petitioner's Motion for Rehearing and Rehearing *En Banc* was denied on November 30, 1998. A-15. Jurisdiction is conferred on this Court by 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause of the Fifth Amendment to the United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Counsel Clause of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.
>
> Title 28, U.S.C. Section 2255:
>
> Federal custody; remedies on motion attacking sentence
>
> A prisoner in custody under sentence of a court established by act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon. . . .
>
> * * *

STATEMENT OF THE CASE

A. Procedural History

In April, 1991, Mr. Jarvis and four codefendants were charged in a 40 count, Eastern District of Virginia indictment with conspiracy to distribute, and possess with intent to distribute cocaine from June, 1988, through the filing of the indictment, and related substantive offenses. Mr. Jarvis's codefendants all pled guilty.

Following trial, Jarvis was found guilty on the conspiracy count and twelve substantive counts. The jury

was unable to reach a verdict on four substantive counts which the government subsequently dismissed. Mr. Jarvis received various concurrent prison sentences of 262 months or less, followed by ten years of supervised release.

On direct appeal, the Fourth Circuit vacated Mr. Jarvis's conspiracy conviction and corresponding sentence finding plain error in the violation of Mr. Jarvis's double jeopardy rights where the government had prosecuted him for essentially the same offense for which he had been prosecuted and convicted in the Southern District of Florida. *United States v. Jarvis*, 7 F.3d 404, 408-13 (4th Cir. 1993).[1] A-4-5. The court rejected Jarvis's claim that the district court had erred by denying him a *Kastigar* [*v. United States*, 406 U.S. 441 (1972)] hearing on his immunity claim because the immunity he had received was transactional, not use. *Id.* at 413-14. A-5. The court declined to address Jarvis's claim of ineffective assistance of counsel based on his attorney's failure to raise immunity and double jeopardy objections to his prosecution.

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[1] Jarvis was arrested in Florida on January 22, 1990. In September, 1990, after his first trial resulted in a hung jury, Jarvis was convicted in the Southern District of Florida of conspiracy to possess with intent to distribute cocaine. This conviction preceded the Eastern District of Virginia indictment. Jarvis's conviction was affirmed by the Eleventh Circuit Court of Appeals in an unpublished opinion. *United States v. Jarvis*, 978 F.2d 720 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 3046 (1993) Recently, after Jarvis's section 2255 motion to vacate was denied, the Eleventh Circuit Court of Appeals affirmed in an unpublished decision.

Id. at 15. A-5. This Court denied certiorari. *Jarvis v. United States*, 510 U.S. 1169 (1994).[2]

Jarvis filed a pro se motion to vacate pursuant to 28 U.S.C. section 2255. He asserted four grounds:

> (1) The government violated his due process rights by failing to disclose documents establishing his continuous cooperation with various law enforcement agencies after February 9, 1988, the date of his immunity agreement, through the end of 1989;
>
> (2) The Fourth Circuit's decision was erroneous in light of the newly discovered documents establishing Jarvis's continued cooperation with the government after February 9, 1988;
>
> (3) Trial counsel was ineffective for failing to give notice of, and seek a jury instruction for, a public authority defense; and
>
> (4) Trial counsel was ineffective for failing to object to testimony regarding the Florida conspiracy.

A-5-6.

The district court denied Mr. Jarvis an evidentiary hearing. It ruled that (1) Jarvis had failed to demonstrate that the exculpatory documents not turned over in discovery by Florida prosecutors were also not provided by

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[2] Upon remand, the district court reinstated Jarvis's 262 month sentence. The resentencing was affirmed by unpublished opinion, *United States v. Jarvis*, 41 F.3d 1504 (4th Cir. 1994), and this Court denied certiorari. *Jarvis v. United States*, 514 U.S. 1113 (1995). A-5.

Virginia prosecutors;[3] (2) the Fourth Circuit decision on Jarvis's immunity claim was not subject to review on habeas corpus; (3) the Fourth Circuit's rejection of Jarvis's claim of use immunity precluded any reliance upon a public authority defense and, in any event, Jarvis failed to suffer prejudice from any incompetent failure to present such a defense because the jury convicted Jarvis despite his testimony claiming public authority for his criminal acts; and (4) despite the Fourth Circuit's finding of plain error in the violation of Jarvis's double jeopardy rights, the record did not demonstrate trial counsel's incompetence in failing to object and, in any event, the remedy of vacating the conspiracy conviction instead of ordering a new trial was not reviewable on habeas corpus. A-7-11.

Although on reconsideration, Jarvis's counsel indicated that the Virginia prosecutor had not disclosed the exculpatory documents, based on the government's bare assertion that all documents had been turned over, the district court found that the documents had been provided to Jarvis's trial counsel and denied the motion to reconsider. A-13-14.

The Fourth Circuit found no reversible error and, accordingly, denied Jarvis's certificate of appealability.

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[3] Upon Jarvis's related section 2255 claim in the Southern District of Florida, the district court deemed he was entitled to an evidentiary hearing but thereafter denied his claim based principally on the fact that any public authority *preceded* the charged offenses.

A-1-2. The court subsequently denied Jarvis's Motion for Rehearing and Rehearing *En Banc*. A-15.

B. Facts

On February 9, 1988, Mr. Jarvis was debriefed by members of a Norfolk police and FBI Joint Narcotics Task Force. The interview was predicated upon the interviewers' agreement, approved by an Eastern District of Virginia prosecutor, that Mr. Jarvis would not be prosecuted locally or federally for the information he provided. *Jarvis*, 7 F.3d at 407-08. Jarvis granted the interview in an effort to assist his girlfriend who had been set-up in a narcotics sting. Jarvis detailed his extensive narcotics use and trafficking activities during the preceding ten years. He gave substantial incriminating information about local narcotics suppliers and buyers.

Jarvis's cooperation with the Joint Narcotics Task Force and other law enforcement officers continued from the date he was provided immunity through, at least, late 1989. During this time Jarvis regularly provided information to Virginia Beach police officer (and later Special Investigation Unit supervisor) Greg Mullen and other FBI agents. He was formally documented by Mullen as a confidential informant. He provided information regarding the narcotics trafficking activities of each of his codefendants. He provided specific information used in a search warrant affidavit and also in a forfeiture affidavit. He wore a body bug to facilitate investigation of suspected narcotics traffickers. He also conducted a controlled narcotics transaction.

Prior to trial, Mr. Jarvis's counsel obtained some of the documents relating to Jarvis's extensive cooperation with the Joint Narcotics Task Force. However, as Jarvis alleged in his 2255 proceedings, his prosecutors failed to provide him at least four, material exculpatory documents which he later obtained in 2255 proceedings in Florida:

> 1. A FBI 302 reflecting Jarvis's April 6, 1988, debriefing during which Jarvis provided information regarding a Deputy United States Marshal who was suspected of illegal conduct. The deputy solicited a loan from Jarvis; Jarvis then gave him $120.00.
>
> 2. A FBI 302 reflecting Jarvis's April 8, 1988, debriefing during which Jarvis relayed the contents of follow-up conversations with the Deputy United States Marshal.
>
> 3. A three page FBI 302 reflecting Jarvis's December 8, 1988, debriefing. During this interview, Jarvis provided information regarding a former girlfriend who sold cocaine to him on many occasions and to whom he sold cocaine on many occasions. He advised the agents about other persons with whom his former girlfriend dealt drugs and about a large party at which people were using drugs.
>
> 4. A FBI 302 regarding Jarvis's January 10, 1989, debriefing during which Jarvis agreed to wear, and was outfitted with, a body bug for the purpose of recording conversations between him and a target regarding suspected narcotics trafficking.

At no time prior to trial, did defense counsel ever invoke court process to explore the scope of immunity

conferred by the February 9, 1988, agreement, or any other immunity implied or explicit within Jarvis's extensive cooperation with members of the Norfolk police or FBI. Counsel never sought a *Kastigar* hearing. However, at a preliminary trial proceeding, in addressing the prosecutor's motion to quash a subpoena seeking to compel her testimony, defense counsel advised the court that the defense at trial would be that Mr. Jarvis was acting as a government informant with immunity while engaging in the acts charged in the indictment.

At trial, the government's evidence was substantial. One by one, the people against whom Jarvis provided the most substantial information during his cooperation, including several codefendants, took the stand and incriminated Jarvis. Many of them had been arrested as a result of Jarvis's cooperation. The government's case was bolstered by the testimony of Virginia Beach police officer Mullen who was privy to Jarvis's various debriefings throughout 1988 and 1989, the period covered by the indictment.

Not until the government had rested and defense counsel had moved for judgments of acquittal on each count in which Jarvis was charged, did counsel make further reference to Jarvis's immunity. Counsel moved for a judgment of acquittal as to all counts based on the immunity conferred on February 9, 1988, reflected in the FBI 302. Defense counsel argued that much of the evidence introduced at trial derived from information and leads provided in that debriefing. The district court denied this motion.

The mainstay of the defense case was the testimony of Douglas Jarvis. He admitted using and trafficking in narcotics for approximately the last twelve years. He testified that his narcotics activities during the period alleged in the indictment were punctuated by regular meetings with Mullen and other FBI agents during which he would fully disclose his activities. He testified that Mullen directed and encouraged his continued narcotics activities during this time to advance Mullen's own investigation. In January, 1990, while attempting to consummate a cocaine deal for Mullen in Florida, Jarvis testified he was arrested. He testified that he told the arresting agents that he was working for Mullen at the time.

Despite this apparent reliance upon a public authority defense, defense counsel had failed to give the required notice of this defense. Fed. R. Crim. P. 12.3. Defense counsel likewise failed to seek a public authority defense jury instruction. Counsel argued to the jury that the witnesses against Jarvis were not worthy of belief because, *inter alia*, they had an ax to grind against Jarvis. Based on this defense, the jury returned guilty verdicts on the main conspiracy count and a majority of the underlying substantive counts.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit Court of Appeals, by approving the district court's denial of an evidentiary hearing, has decided a fundamental federal question in a way which conflicts with decisions of other federal courts of appeals and has sanctioned the lower court's departure from the usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Given the imposing restrictions established by the Anti-terrorism and Effective Death Penalty Act, a litigant's need for a hearing to resolve material questions of fact raised in a section 2255 motion to vacate is paramount. The Act's deadlines restrain a prisoner from better developing the basis for his claim before filing. The opportunity for subsequent review has been all but eliminated. If the district court does not provide a hearing at which the prisoner can substantiate his claim and cross-examine and discredit any government response, the entire purpose of this statutory incarnation of the Great Writ will be rendered nugatory.

The instant case depicts all too common an example of the government's modis operandi for prosecuting federal narcotics offenses. The government will often play the right side against the left, then the left side against the right, and then after the dust settles, bring the weight of the sovereign crashing down upon that side which presents it the greatest "prize".

In the instant case, Doug Jarvis was the "right" side. Beginning at least as early as February, 1988, the government tapped his vast wealth of information regarding narcotics trafficking in the Eastern District of Virginia and

the Southern District of Florida. It obtained devastatingly incriminating information against an array of citizens and suspects in exchange for an elusive promise not to prosecute him for his criminal acts. Its use of this information to further investigate, arrest, and prosecute these individuals placed Jarvis's life at risk.

While continuing to string Jarvis along and maintain this invaluable source of intelligence and liaison with the narcotics underworld, the government next played the "left" side. It now made contact with the persons identified by Jarvis as narcotics traffickers and squeezed them for information, particularly against Jarvis. When the dust settled, it was determined that Jarvis, who had now been arrested and charged for his "undercover" acts in Florida, would provide the biggest "prize" for the government. Accordingly, despite Jarvis's substantial contribution to the government's war on drugs, the government abandoned him and brought its weight to bear against him.

Seeking vindication, Mr. Jarvis alleged in his 2255 proceedings that the government failed to provide him, according to its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), exculpatory documents demonstrating his substantial and continuous cooperation relationship with Virginia police officer (and later sergeant) Mullen and federal agents on the Joint Narcotics Task Force. In response, the government asserted that the documents which Jarvis continues to maintain were not provided, were irrelevant, but in any event were provided. These contradictory assertions presented the classic question of fact that, under the due process clause of the fifth amendment and Title 28, U.S.C. section 2255, demanded an

evidentiary hearing. Nonetheless, the district court resolved this dispute in favor of the government and denied Jarvis relief. A-13-14.

The command of Title 28, U.S.C. section 2255 is clear and unequivocal: "Unless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief, the court *shall* . . . grant a prompt hearing thereon . . . ." (Emphasis added). In *United States v. Hayman*, 342 U.S. 205 (1952), this Court explored the meaning of "hearing" within the context of section 2255. It concluded that this "has obvious reference to the tradition of judicial proceedings." *Id.* at 220 (citation omitted). This Court emphasized the importance of the hearing: "Respondent, denied an opportunity to be heard, 'has lost something indispensable, however convincing the *ex parte* showing.' " *Id.* (citation omitted).

The federal appellate courts have been clear about the importance of a hearing in 2255 proceedings. As the court noted in *Friedman v. United States*, 588 F.2d 1010 (5th Cir. 1979), "The Hearing Is The Thing." *Id.* at 1014. The court held that, in determining whether to grant an evidentiary hearing, a district court must determine (1) whether the record, as supplemented by the trial judge's personal knowledge or recollection, conclusively negates the factual predicates asserted in support of the motion, and (2) would the petitioner be entitled to relief as a legal matter if those factual allegations which are not conclusively refuted by the record are in fact true. *Id.* at 1015.

In *Friedman*, the defendant claimed, *inter alia*, that he was denied effective assistance of trial counsel. The district judge, who had presided over the petitioner's two

trials, found his allegations to be "completely spurious" and "patently frivolous." *Id.* at 1014. Reversing and remanding for an evidentiary hearing, the court of appeals noted that, though the defendant's trial counsel had controverted the petitioner's allegations by an affidavit, contested factual issues could not be resolved on the basis of affidavits. *Id.* at 1015. Even though the district judge believed counsel was competent in the courtroom, this still allowed the possibility that outside the courthouse he was "flagrantly derelict in fulfilling his responsibilities . . . ." *Id.* at 1016. Thus, "the files and records did not *conclusively* show that under no circumstances would [the petitioner] be entitled to relief." *Id.* at 1017. Accordingly, section 2255 required an evidentiary hearing. *Accord Frazer v. United States*, 18 F.3d 778 (9th Cir. 1994) (denial of 2255 motion based on ineffective assistance of counsel reversed and remanded for evidentiary hearing); *United States v. Briggs*, 939 F.2d 222 (5th Cir. 1991) (denial of 2255 motion based on challenge to guilty plea reversed and remanded for evidentiary hearing); *United States v. Barboa*, 777 F.2d 1420 (10th Cir. 1985) (denial of 2255 motion based on coconspirator's alleged status as government agent reversed and remanded for evidentiary hearing); *United States v. Auten*, 632 F.2d 478 (5th Cir. Unit A 1980) (denial of 2255 motion based on *Brady* violation reversed and remanded for evidentiary hearing).

The Fourth Circuit, by approving the district court's summary denial of Mr. Jarvis's *Brady* claim, has rendered a decision that conflicts with the express language of section 2255 and the above referenced cases interpreting the petitioner's entitlement to an evidentiary hearing. The court has robbed Mr. Jarvis of a critical opportunity

to fully and fairly substantiate the denial of his fundamental due process rights which he pled in his petition. Significantly, Jarvis's same allegations in his Southern District of Florida case required an evidentiary hearing. Although that claim was denied, ultimately it was denied on grounds totally inapplicable to this case. Accordingly, the decision below has, so far, sanctioned the lower court's departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power.

II. The Fourth Circuit Court of Appeals, by approving the district court's rejection of Jarvis's ineffective assistance of counsel claim, has confused the concepts of "use immunity" and "public authority" and has so far sanctioned the lower court's erroneous analysis of prejudice as to call for an exercise of this court's supervisory power.

The Sixth Amendment right to counsel is perhaps the most important right a defendant enjoys at trial. Through it, a defendant accesses virtually all other trial rights, including the right to present testimony and evidence in support of a defense. *See Matthews v. United States*, 585 U.S. 58, 63 (1988) (criminal defendant has right to have jury instructed on valid theory of defense supported by any relevant evidence).

In *McMann v. Richardson*, 397 U.S. 759 (1970), this Court explained that the Sixth Amendment right to counsel contemplated "effective assistance of counsel." *Id.* at 771 n. 14. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that to establish ineffective assistance of

counsel, a defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding. *Id.* at 687-88.

In approving the district court's rejection of Mr. Jarvis's ineffective assistance of counsel claim, the Fourth Circuit implicitly approved the district court's reasoning that, because the Fourth Circuit had previously rejected Mr. Jarvis's claim that he was conferred use immunity, the public authority defense which Jarvis claimed his trial attorney was incompetent for failing to pursue, was legally unavailable. A9-10. This reasoning reflects a fundamental misconception of the "use immunity" and "public authority" concepts.

Contrary to the district court's reasoning, the Fourth Circuit's conclusion that Mr. Jarvis was not conferred use immunity had no bearing on the viability of, or his entitlement to pursue, a public authority defense. "Use immunity" is a legal or contractual bar against the government's use of information from a witness, perhaps a defendant, which is either compelled by court process or volunteered in exchange for an agreement that the information, and perhaps derivature information, will not be used against the individual in a criminal prosecution. *See generally Kastigar v. United States*, 406 U.S. 441 (1972); 18 U.S.C. section 6002. "Public authority", on the other hand, does not concern itself with the use or admissibility of information or testimony. Instead, it constitutes an affirmative defense by which "the defendant seeks exoneration based on the fact that he reasonably relied on the authority of a government official to engage him in a

covert activity." *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1368 n. 18 (11th Cir. 1994). *Accord United States v. Reyes-Vazquez*, 905 F.2d 1497, 1500 n. 5 (11th Cir. 1990). Thus, the fact that Mr. Jarvis may not have been conferred use immunity did not, in any way, undermine the validity or strength of his public authority defense.

Mr. Jarvis's public authority defense was well-supported at trial. Foremost, Jarvis testified that during the time leading up to his January, 1990, Florida arrest, he was regularly reporting his narcotics activities to FBI agents, Norfolk police officers, and officer Mullen, and was being encouraged to continue them to facilitate the arrests and prosecutions of the narcotics traffickers. During this time, Mullen documented Jarvis as a confidential informant. This confidential informant agreement was introduced into evidence. Although Mullen claimed that there were rules prohibiting informants from procuring narcotics without specific authorization, shortly before Mullen documented Jarvis, Jarvis made an "unauthorized" buy of narcotics on Mullen's behalf for which Mullen reimbursed Jarvis. He further rewarded Jarvis for this "unauthorized" activity by formally documenting him. Pursuant to his informant agreement, Jarvis identified each of his codefendants to Mullen and apprised him of their cocaine trafficking activities.

Clearly, by announcement to the court immediately preceding trial, Jarvis's trial counsel expressed his intent to present, if not his belief that he was presenting, a public authority defense. The lengthy testimony he elicited from Jarvis, which largely admitted the criminal acts charged in the indictment, repeatedly referred to Jarvis's ongoing cooperation with law enforcement officers. It

highlighted the officers' encouragement for him to pursue the cocaine traffickers with whom he was involved. Ultimately, it claimed official authority for Jarvis's illegal acts. Absent reliance on a public authority defense Jarvis's testimony was tantamount to a confession of guilt. *Cf. United States v. Span*, 75 F.3d 1383, 1390 (9th Cir. 1996) (counsel's failure to request jury instruction on self-defense ineffective assistance because only defense available to the defendant). Under these circumstances, trial counsel's failure to request the public authority instruction to which Jarvis was entitled constituted ineffective assistance of counsel.

The district court's analysis of "prejudice," implicitly approved by the Fourth Circuit, is also fundamentally flawed and departs from the acceptable and usual course of judicial proceedings. Quoting from *Strickland*, the district court noted that, to establish prejudice, a defendant must show that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 694, A-9. In *Strickland*, this Court further explained:

> In making [a prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the . . . jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidence picture, and some will have had an isolated, trivial effect.

Id. at 695-96.

In finding no prejudice, the district court reasoned that, because Jarvis was allowed to testify to the facts underlying his public authority defense, "[t]he jury could have chosen to believe [him] and, even without a specific instruction, could have found him not guilty. The jury, however, chose to disbelieve [Jarvis] and found him guilty. Accordingly, [Jarvis]'s claim must fail . . . because he cannot prove that but for his counsel's failures, the result of his trial would have been different." A-10.

The district court's analysis ignores the fact that the defect Jarvis claims in trial counsel's performance, failing to request a public authority instruction and pursuing this defense, was one of those errors that would have "had a pervasive effect on the inferences drawn from the evidence, altering the entire evidence picture . . . " Absent a theory of defense instruction, Jarvis's testimony was essentially a confession of guilt. Without the instruction, it is little wonder that the jury convicted (though it had clear doubt regarding at least four counts). The public authority instruction to which Jarvis was entitled was absolutely essential to assist the jury in properly evaluating Jarvis's testimony and the other, substantial evidence that supported his defense and exonerated him. Under this proper mode of analysis, the conclusion is inescapable that, had the jury been properly instructed on the significance of the public authority testimony and evidence, a reasonable probability exists that the verdict would have been different. *Cf. Span*, 75 F.3d at 1390 (defendant prejudiced by attorney's failure to request excessive force instruction where this defense was supported by substantial evidence). Because the Fourth Circuit approved the district court's analysis which departs

from the analysis prescribed by this Court in *Strickland*, review should be granted.

CONCLUSION

For these reasons, the Petitioner respectfully prays that this Court grant its Writ of Certiorari.

Respectfully submitted,

BENJAMIN S. WAXMAN, Esquire
ALAN S. ROSS, Esquire
ROBBINS, TUNKEY, ROSS, AMSEL,
RABEN & WAXMAN, P.A.
2250 Southwest Third Avenue
Fourth Floor
Miami, Florida 33129
(305) 858-9550

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-6512

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DOUGLAS ALAN JARVIS,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Raymond A. Jackson, District Judge. (CR-91-70-N, CA-97-524-2)

Submitted: July 30, 1998 Decided: August 26, 1998

Before WIDENER, LUTTIG, and WILLIAMS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Douglas Alan Jarvis, Appellant Pro Se. Laura Marie Everhart, Assistant United States Attorney, Norfolk, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant seeks to appeal the district court's order denying his motion filed under 28 U.S.C.A. § 2255 (West 1994 & Supp. 1998) and the court's subsequent denial of his motion for reconsideration of his § 2255 motion. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. *United States v. Jarvis*, Nos. CR-91-70-N; CA-97-524-2 (E.D. Va. Dec. 9, 1997 and Feb. 18, 1998). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

DOUGLAS ALAN JARVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CIVIL NO. 2:97cv524
CRIMINAL NO. 2:91cr70

(Filed Dec. 9, 1997)

MEMORANDUM OPINION AND FINAL ORDER

This matter is before the Court on Petitioner's *pro se* motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. Both parties have submitted briefs on the relevant issues; thus, the matter is ripe for judicial determination. For the reasons set forth below, Petitioner's motion is **DENIED.**

I. FACTUAL AND PROCEDURAL HISTORY

In November, 1990, Petitioner was convicted in the Southern District of Florida of conspiracy to possess with intent to distribute five kilograms of cocaine in violation of 21 U.S.C. § 846. *United States v. Jarvis*, 7 F.3d 404, 407 (4th Cir. 1993), *cert. denied*, 510 U.S. 1169 (1994). On July 19, 1991, Petitioner was convicted by a jury in the Eastern District of Virginia of one count of conspiracy to distribute in excess of five kilograms in violation of 21 U.S.C. § 846, seven counts of violating 21 U.S.C. § 841(a)(1) and

five counts of violating 18 U.S.C. § 1952(a)(3). *Id.* at 408. Petitioner was convicted despite his testimony that (1) he was a confidential government informant, (2) that his conduct was done at the behest of Virginia law enforcement officials and (3) that he was protected by an immunity agreement. Petitioner was sentenced to 262 months imprisonment on the conspiracy count and equal or lesser terms on twelve substantive counts. *Id.* After imprisonment, Petitioner was subject to supervised release. *Id.* The Court ordered all the sentences to run concurrently with one another and with the sentence in Southern District of Florida. *Id.*

Petitioner appealed his conviction and sentencing. On appeal the Fourth Circuit was confronted with three issues:

> (1) whether the district court plainly erred by allowing Jarvis to proceed to trial on charges of conspiracy to distribute cocaine, in violation of the Double Jeopardy Clause of the Fifth Amendment; (2) whether the district court erred by failing to require the Government to prove that its case against Jarvis did not derive in part from testimony provided by Jarvis pursuant to a grant of immunity from prosecution; and (3) whether Jarvis was denied the effective assistance of counsel by his lawyer's failure to raise the foregoing immunity and double jeopardy defenses by motion.

Id. at 406. With respect to the first issue, the Fourth Circuit held that Petitioner's conspiracy conviction was based on conduct of which he was convicted in Florida, thus violating the Double Jeopardy Clause. *Id.* The court

vacated and remanded Petitioner's conviction and sentence on that count. With respect to the second issue, after careful consideration, the court held that Jarvis's immunity agreement contemplated transactional, not use, immunity and that neither conduct charged in the indictment nor prosecuted at trial involved immunized conduct. *Id.* Consequently, the court found that "the district court did not err by failing to afford Jarvis a hearing at which the origins of the Government's case could be explored." *Id.* With respect to the third issue, based on its rulings on the previous two issues, the court declined to discuss the ineffective assistance of counsel claim. *Id.*

On remand, this Court reimposed the same sentence of 262 months imprisonment. Petitioner appealed his sentence a second time; however, on November 21, 1994, the Fourth Circuit affirmed the sentence. *United States v. Jarvis*, 41 F.3d 1504 (4th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995).

On May 23, 1997, Petitioner filed *pro se* the instant § 2255 motion in which he alleges four (4) grounds for vacating his sentence.[1] First, Petitioner alleges that the Government violated his due process rights by failing to disclose documents which would establish that he was working with law enforcement agencies after February 9, 1988. Second, Petitioner alleges that the Fourth Circuit's decision, *Jarvis*, 7 F.3d 404, regarding his immunity claims is erroneous in light of discovery violations allegedly committed by the Government. Third, Petitioner alleges

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[1] Petitioner's memorandum of law relies heavily upon a similar § 2255 motion and memoranda of law filed in the Southern District of Florida.

that his trial counsel was ineffective for not filing a pre-trial motion pursuant to Rule 12.3[2] and for not requesting jury instructions for the public authority defense and entrapment by estoppel. Finally, Petitioner alleges either that his counsel was ineffective for not objecting at trial to testimony regarding the Florida conspiracy or that the Fourth Circuit should have ordered a new trial.

Upon initial consideration, on July 22, 1997, the Court determined that summary dismissal of Petitioner's motion pursuant to rule 4(b) was not appropriate. The Court ordered the United States Attorney to file an answer to Petitioner's motion and, Petitioner was notified of his right to respond. On August 18, 1997, the United States Attorney filed a response. On September 9, 1997, Petitioner filed a reply to the United States' answer.

II. LEGAL STANDARD

28 U.S.C. § 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court

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[2] Federal Rule of Criminal Procedure 12.3 requires the defendant to provide notice to the government if he intends to "claim a defense of actual or believed existence of public authority."

> which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

III. DISCUSSION

A. Discovery Violations

Petitioner alleges that the Government committed discovery violations of a constitutional magnitude such that his sentence was improper. Petitioner's claim must be denied, however, because he has not met his burden to demonstrate discovery violations. Petitioner does not point to any evidence which the government failed to disclose to the defense. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Only evidence that is both favorable to the accused and material to either guilt or punishment must be disclosed. *Id.* A conviction should be reversed only where there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. *U.S. v. Bagley*, 423 U.S. 667 (1987). The probability of error must be sufficient to undermine confidence in the outcome of the proceeding. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Petitioner alleges that by failing to produce certain documents, the Virginia prosecutor was able to mislead both this Court and the fourth Circuit on the issue of whether he was working as a government informant. To support his argument, Petitioner relies on information uncovered in an evidentiary hearing held regarding his § 2255 motion

which is pending in the Southern District of Florida. The information discusses only what the Florida prosecutors knew about Petitioner's dealing with Virginia law enforcement officials and what the Florida defense did not learn about till after the trial. This information does not support finding a discovery violation in this case. Petitioner's argument makes no reference whatsoever to information the Virginia prosecution had in its possession and what information should have been turned over to defense counsel. The information uncovered in the evidentiary hearing in the Southern District of Florida details possible discovery violations by Florida prosecutors, not Virginia prosecutors. With no evidence beyond speculation of what information the Virginia prosecution failed to turn over, Petitioner's claim must be dismissed. *Boeckenhaupt v. United States*, 537 F.2d 1182, 1184 (4th Cir. 1976), *cert. denied*, 429 U.S. 863 (1976).

B. Erroneous Immunity Ruling by the Fourth Circuit

Petitioner argues that the Fourth Circuit's decision on the question of what immunity he had been granted was tainted by discovery violations committed by the prosecution. Petitioner's claim may not be reviewed by this Court, however, because issues litigated and decided on direct appeal may not ordinarily be collaterally attacked. *Boeckenhaupt*, 537 F.2d at 1183. On Petitioner's direct appeal, the Fourth Circuit fully reviewed Petitioner's immunity claim. As discussed previously, Petitioner provides no evidence to this Court that the prosecution failed to disclose evidence pertinent to the resolution of

his claim of immunity. There is no basis for revisiting a matter decided on direct appeal; thus, this claim must be denied. *See Boeckenhaupt*, 537 F.2d at 1184.

C. Ineffective Assistance of Trial Counsel

Petitioner's claim of ineffective assistance of counsel must be denied because he cannot demonstrate that he was prejudiced by his counsel's failure to make a Rule 12.3 motion and request related jury instructions. To prove ineffective assistance of counsel, a litigant must prove both deficient performance and prejudice. *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a litigant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. That is, a litigant must show that counsel's performance fell below an objective standard of reasonableness. *Id.* at 688. To prove prejudice, the litigant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Failure to meet either prong defeats a litigant's ineffective assistance of counsel claim. *Id.* at 700. The court need not address both components of the test if the litigant makes an insufficient showing on one part of the test. *Id.* at 697.

Petitioner was not prejudiced by his counsel's failures. In its decision, the Fourth Circuit undertook a *de novo* review of Petitioner's public authority defense. The circuit court determined that Petitioner was granted transactional immunity for crimes prior to February 11,

1988. *Jarvis*, 7 F.3d at 415. Consequently, because none of the crimes in the indictment occurred before June, 1988, the circuit court found that even had the district court "held a hearing to determine whether the Government deployed Jarvis's immunized testimony in its case-in-chief, the nature of the immunity granted to Jarvis would have prevented the district court from affording any relief." *Id.* at 415. That is, as a matter of law, the district court could not have permitted a defense of public authority or immunity. Thus, it necessarily follows that Petitioner was not prejudiced by the lack of the Rule 12.3 motion and related instructions.

Furthermore, Petitioner was not prejudiced because at trial he was permitted to testify that he was working for Virginia law enforcement officials. Under Rule 12.3(c), the prosecution could have objected to such testimony and sought to prevent its entrance into the record, but the prosecution did not object. The jury could have chosen to believe Petitioner and, even without a specific instruction, could have found him not guilty. The jury, however, chose to disbelieve Petitioner and found him guilty. Accordingly, Petitioner's claim must fail under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, because he cannot prove that but for his counsel's failures, the result of his trial would have been different.

D. Prejudicial Florida Testimony

In this claim, Petitioner argues either that his counsel was ineffective for not objecting to prejudicial testimony about the Florida conspiracy or that once the Fourth Circuit determined that the Double Jeopardy Clause was

violated, the court should have ordered a new trial on the substantive counts because his trial was prejudiced by the inclusion of testimony about the Florida conspiracy charge. In either case, Petitioner's claim fails. Petitioner's first argument fails because, beyond mere allegation, Petitioner has not demonstrated that his counsel's performance was deficient. Petitioner has not established that his counsel did not object at trial to testimony about the Florida conspiracy. Petitioner merely asserts that because the Fourth Circuit determined that the Double Jeopardy Clause was violated, that his counsel necessarily must have been deficient in his performance. Such an allegation cannot support a claim of ineffective assistance of counsel. The trial record must conclusively demonstrate that trial counsel did not provide effective representation. *United States v. Fisher*, 477 F.2d 300, 302 (4th Cir. 1973).

Petitioner's second argument fails because this Court is not the proper forum in which to determine whether the remedy afforded by the circuit court was correct. Absent a change in intervening law, this Court may not collaterally review the decision of a circuit court on direct appeal. *See Davis v. United States*, 417 U.S. 333, 342 (1974); *Boeckenhaupt*, 537 F.2d at 1183. This Court detects no change in the law regarding whether vacating a conviction or ordering a new trial is the proper remedy for a Double Jeopardy violation. Thus, Petitioner's fourth ground for correcting his sentence must be denied.

IV. CONCLUSION

For the aforementioned reasons, Petitioner's motion is **DENIED.**

Petitioner is **ADVISED** that he may appeal from this final order by forwarding a written notice of appeal to the Clerk of the United States District Court, U.S. Courthouse, 600 Grandy Street, Norfolk, Virginia, 23510. Said written notice must be received by the clerk within thirty (30) days from the date of this order.

The Clerk is **DIRECTED** to mail a copy of this Order to Petitioner and to the United States Attorney, Eastern District of Virginia, World Trade Center, Suite 8000, 101 West Main Street, Norfolk, Virginia 23510.

IT IS SO ORDERED.

/s/ Raymond A. Jackson
UNITED STATES
DISTRICT JUDGE

A TRUE COPY TESTE
Norman H. Meyer, Jr., Clerk
By Susan Carpenter
Deputy Clerk

Norfolk, Virginia
December 9, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

DOUGLAS ALAN JARVIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CIVIL NO. 2:97cv524
CRIMINAL NO. 2:91cr70

(Filed Feb. 18, 1998)

MEMORANDUM OPINION AND ORDER

On December 22, 1997, Petitioner filed a motion for reconsideration of this Court's December 19, 1997 order denying Petitioner's *pro se* motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. The gravamen of Petitioner's motion was that the United States committed discovery violations. The Court denied all of Petitioner's claims, in essence, because he failed to point to any evidence which the government failed to disclose. Petitioner now argues for reconsideration on the basis that he now possesses documentary evidence which, upon his information and belief, was not made available to his trial counsel.

As the facts surrounding Petitioner's conviction and sentencing have not changed since the Court's last order, they will not be reiterated here. Courts recognize three grounds for amending an earlier judgment: (1) an intervening change in controlling law, (2) the emergence of evidence not previously available, and (3) the correction of a clear error of law or the prevention of manifest injustice. *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir.

1993). Based upon the representations of the United States, the Court finds that all of Petitioner's documentary evidence was made available to Petitioner's trial counsel. Furthermore, Petitioner has not asserted an intervening change in law or clear error. Accordingly, the Court finds that there is no basis for reconsidering the Court's previous ruling. For the aforementioned reasons, Petitioner's motion for reconsideration is **DENIED.**

The Clerk is **DIRECTED** to mail a copy of this order to Petitioner, to J.T. Stanton, P.C., Plaza One Building, Suite 401, 550 East Main Street, Norfolk, Virginia 23510 and to the United States Attorney, Eastern District of Virginia.

It is so **ORDERED**.

/s/ Raymond A. Jackson
UNITED STATES
DISTRICT JUDGE

Norfolk, Virginia
February 18, 1998

A TRUE TESTE
Norman H. Meyer, Jr., Clerk
By /s/ Susan Carpenter
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 30, 1998

No. 98-6512
CR-91-70-N
CA-97-524-2

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

DOUGLAS ALAN JARVIS

Defendant-Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK